

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARLOS VICTORINO, individually and
on behalf of other members of the general
public similarly situated,

Plaintiff,

v.

FCA US LLC, a Delaware limited liability
company,

Defendant.

Case No.: 16cv1617-GPC(JLB)

ORDER:

**1) DENYING PLAINTIFF'S
MOTION TO ASSOCIATE KIESEL
LAW LLP AS CO-TRIAL COUNSEL;**

**2) GRANTING PLAINTIFF'S
MOTION TO APPOINT KIESEL
LAW LLP AS CO-CLASS
COUNSEL; AND**

**3) GRANTING DEFENDANT'S
MOTION FOR ORDER REQUIRING
CORRECTIVE CLASS NOTICE**

[Dkt. Nos. 388, 390.]

Before the Court is Plaintiff and the Class' motion to associate Kiesel Law LLP as co-trial counsel, or in the alternative, to appoint Kiesel Law LLP as co-class counsel. (Dkt. No. 390.) Defendant filed an opposition. (Dkt. No. 395.) Plaintiff filed a reply.

1 (Dkt. No. 398.) Also before the Court is Defendant’s motion for order requiring
2 corrective class notice. (Dkt. No. 388.) Plaintiff filed an opposition. (Dkt. No. 396.)
3 Defendant filed a reply. (Dkt. No. 397.)

4 Based on the reasoning below, the Court DENIES Plaintiff’s motion to associate
5 Kielsel Law LLP as co-trial counsel, GRANTS Plaintiff’s motion to appoint Kiesel Law
6 LLP as co-class counsel, and GRANTS Defendant’s motion for corrective class notice.

7 **Background**

8 On October 17, 2019, the Court granted Plaintiff Carlos Victorino’s renewed
9 motion for class certification and certified a Class consisting of “[a]ll persons who
10 purchased or leased in California, from an authorized dealership, a new Class Vehicle
11 primarily for personal, family, or household purposes.” (Dkt. No. 318 at 24.) The Court
12 appointed Plaintiff Carlos Victorino as the class representative and Capstone Law APC as
13 class counsel. (Dkt. No. 318.)

14 After full briefing regarding disputes over the class notice and notice plan, (Dkt.
15 Nos. 350, 351, 352), on August 27, 2020, the Court granted in part Plaintiff’s renewed
16 motion for approval of proposed class notice and notice plan. (Dkt. No. 353.) The
17 proposed long form notice asks “Do I have a lawyer in this case?” and provides the
18 following response:

19 The Court decided that the law firm Capstone Law APC is qualified to
20 represent the class, and appointed it as “Class Counsel.” Capstone Law is
21 experienced in handling similar class action cases. More information about
22 these law firms, their practices and their lawyers’ experience is available at
www.capstonelawyers.com.

23 (Dkt. No. 350-4. Zhody Decl., Ex. 2 at 7.¹) On the question, “How will the Lawyers be
24 paid?”, the long form notice provides,

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27 ¹ Page numbers are based on the CM/ECF pagination.
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If Class Counsel is successful in getting money or other benefits for the class, they will ask the Court to recover their fees and expenses associated with this case. You won't have to pay these fees and expenses out of your own pocket. If the Court grants Class Counsel's request, the fees and expenses would be either deducted from any money obtained for the class or paid separately by FCA US.

(*Id.*)

Discussion

A. Motion to Associate Kiesel Law LLP as Co-Trial Counsel

Plaintiff asks that the Court allow Kiesel Law LLP ("Kiesel Law") to associate in as co-trial counsel because it will benefit the class due to Kiesel Law's extensive trial experience and success. (Dkt. No. 390-1 at 3.) Defendant opposes arguing that Plaintiff cannot circumvent Rule 23 by seeking to associate in another law firm. (Dkt. No. 305 at 4-5.)

Plaintiff does not provide any on point legal authority to support an association of counsel after a class has been certified and notice disseminated. Unlike a non-class action civil case, Federal Rule of Civil Procedure 23 governs this case. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010). While Rule 23(g) provides for the appointment of class counsel, it does not provide for an association of counsel. In fact, Plaintiff relies on cases addressing the appointment of additional class counsel and not an association of additional counsel. (See Dkt. No 390-1 at 3.) Accordingly, the Court DENIES Plaintiff's motion to associate Kiesel Law as co-trial counsel as legally unsupported.

B. Motion to Appoint Kiesel Law as Co-Class Counsel

Plaintiff, alternatively, moves to appoint Kiesel Law as co-class counsel under Rule 23(g). (Dkt. No. 390-1 at 4.) Defendant responds that Plaintiff has failed to satisfy three of the four factors to support the appointment of Kiesel Law as class counsel and

1 adding class counsel will render the notice stating who is class counsel false. (Dkt. No.
 2 395 at 6.) In reply, Plaintiff argues he has addressed the four factors and the notice is not
 3 false because Capstone Law still remains class counsel. (Dkt. No. 398 at 5-6.)

4 Rule 23(g)(1)(A) requires that courts consider the following factors in appointing
 5 class counsel: “(i) the work counsel has done in identifying or investigating potential
 6 claims in the action; (ii) counsel's experience in handling class actions, other complex
 7 litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the
 8 applicable law; and (iv) the resources that counsel will commit to representing the class.”
 9 Fed. R. Civ. P. 23(g)(1)(A). Rule 23(g)(4) also requires that class counsel “must fairly
 10 and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(4). In
 11 appointing class counsel, the Court “may make further orders in connection with the
 12 appointment.” Fed. R. Civ. P. 23(g)(1)(E).

13 The Court concludes that the four factors have been satisfied. On the first factor,
 14 because Kiesel Law is coming in to try the case and not to investigate or identify
 15 potential claims, this factor is not relevant. Kiesel Law also has sufficient experience in
 16 not only class actions but has handled vehicle warranty class actions and is
 17 knowledgeable about the applicable law. (Dkt. No. 390-3, Kiesel Decl. ¶¶ 4, 6; Dkt. No.
 18 390-1 at 6, 8.) Finally, on the fourth factor, Kiesel Law has stated it is willing and able to
 19 serve and has the means and willingness to assist class counsel. (Dkt. No. 390-3, Kiesel
 20 Decl. ¶¶ 9-10.)

21 In opposition, Defendant argues that having two law firms will lead to
 22 inefficiencies, and duplication of work; however, because Kiesel Law is being brought in
 23 to conduct trial, this argument is not well taken as the discovery and motion practice have
 24 been completed. However, in the event that Plaintiff prevails and attorneys' fees are at
 25 issue, the Court will carefully review the attorney fee records to ensure there is no
 26 unnecessary duplication of work with the appointment of Kiesel Law as co-class counsel.

1 Defendant also contends the Court should consider that the class notice, which
 2 informed class members that Capstone Law APC is “Class Counsel”, would be rendered
 3 false by appointing Kiesel Law as co-class counsel. (Dkt. No. 395 at 7.) Defendant
 4 explains that class members relied on counsel’s information in the notice in deciding
 5 whether to opt out or stay in the class and they have a due process right to receive
 6 accurate information. (*Id.*) It further maintains that it has a due process right in making
 7 sure the information in the notice remains accurate. (*Id.*) Plaintiff summarily responds
 8 that the notice is accurate since Capstone Law APC will remain as class counsel. (Dkt.
 9 No. 398 at 6.)

10 Neither party has provided any caselaw in support of their position whether the
 11 notice should be updated to reflect the appointment of Kiesel Law as co-class counsel.
 12 The Court is also unable to locate any authority on this issue. Typically, district courts
 13 have granted motions to appoint additional class counsel but they have been unopposed
 14 and granted prior to the class notice being disseminated. *See e.g., Krommenhock v. Post*
 15 *Foods, LLC*, Case No. 16-cv-04958-WHO, 2020 WL 2322993, at *3 (N.D. Cal. May 11,
 16 2020) (granting motion to appoint additional class counsel as unopposed because the
 17 expert work and trial in this case will be extensive and complex but prior to class notice
 18 being issued); *Dawson v. Great Lakes Educational Loan Servs., Inc.* 15-cv-475-jdp, 2019
 19 WL 6619325, at 1 (W.D. Wisc. Dec. 15, 2019) (granting unopposed motion to appoint
 20 additional class counsel appointment as appropriate under Federal Rule of Civil
 21 Procedure 23(g)(1) before second round of class notice); *Jermyn v. Best Buy Stores, L.P.*,
 22 No. 08 Civ. 214(CM), 2011 WL 280798, at *1 (S.D.N.Y. Jan. 18, 2011) (granting
 23 unopposed motion to appoint additional counsel after class was certified but before class
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1 notice²); but see *Kaplan v. S.A.C. Capital Advisors, L.P.*, Case NO. 12 Civ. 9350 (NRB),
 2 Dkt. 283 (S.D.N.Y. July 5, 2016) (granting unopposed motion for appointment of
 3 additional class counsel after class certification and after class notice).

4 To ensure that class members are informed of the appointment of co-class counsel,
 5 Plaintiff shall issue an amended notice. The Court DIRECTS to parties to engage in a
 6 meaningful meet and confer on the language for the amended class notice. To the extent
 7 they disagree, either party may seek leave of court seeking its guidance.

8 **C. Defendant’s Motion for Order Requiring Corrective Class Notice**

9 Defendant moves for an order requiring Plaintiff to “provide an explanation for
 10 how the recipients of the 4,908 class notices were identified, including whether Plaintiff
 11 limited the recipients to only those persons who were original purchasers or lessees of
 12 new vehicles” and “provide a corrective notice to those recipients who were not original
 13 purchasers or lessees of new vehicles, and thus not members of the certified class.” (Dkt.
 14 No. 388-1 at 9.) Plaintiff does not directly address why notices were sent to 4,908
 15 addresses but it appears that CPT Group Inc. (“CPT”), the class administrator, received
 16 contact information extracted from VINs provided by counsel and sent notices to the
 17 mailing list that contained 4,908 records. (Dkt. No. 396 at 8.) Plaintiff further argues
 18 that the class notice need not be perfect and may be overinclusive. Moreover, recipients
 19 of the short and long notice should not be confused because the notices define that only
 20 those who acquired a new vehicle are class members. (*Id.* at 5-6.)

21 According to the notice procedure, on April 9, 2021, Defendant provided VINs of
 22 1,978 Dodge Dart vehicles originally sold or leased in California to Plaintiff. (Dkt. No.
 23 388-1 at 4.) Then IHS Markit, a third-party vendor, used the VINs to obtain class
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 26 ² *Jermyn v. Best Buy Stores, L.P.*, Case No. 08cv214(CM), Dkt. Nos. 150, 151 (S.D.N.Y. Jan. 18 & 20,
 27 2011).

1 members' names and mailing addresses from the California DMV. (Dkt. No. 368.)
 2 Subsequently, CPT used the information and sent out the class notice. (Dkt. No. 388-1 at
 3 4; (Dkt. No. 396-1, Zohdy Decl. ¶ 6.) CPT received a mailing list of 4,908 records, and
 4 on October 19, 2021, class notices were mailed to the 4,908 names on the list. (Dkt. No.
 5 379-1, Dancy Decl. ¶¶ 5, 7.)

6 The Court agrees with Defendant and questions why 4,908 notices were sent out
 7 when there are only 1,978 class vehicles. While the Court was not provided the DMV
 8 records, in prior briefing, the parties did not disagree that the DMV records would have
 9 identified purchasers of new vehicles and those should have been the ones that should
 10 have received a notice. Moreover, in the Court's order re: DMV release of class member
 11 information, the DMV was ordered to release the "names and addresses of original
 12 owners and lessees of the vehicles associates with the titles of the VINS at issue . . ." (Dkt. No. 368 at 2.) It appears that DMV may have provided the names and address of
 13 all owners and lessees of the class vehicles.

14 In light of the fact that an amended class notice will be provided to appoint Kiesel
 15 Law as co-class counsel, the Court GRANTS Defendant's motion for corrective class
 16 notice. The Court again DIRECTS to parties to engage in a meaningful meet and confer
 17 on the language for the amended class notice. To the extent they disagree, either party
 18 may seek leave of court seeking its guidance.

19 Accordingly, the Court GRANTS Defendant's motion for an order requiring
 20 corrective class notice and DENIES Defendant's motion requiring Plaintiff to provide an
 21 explanation for how the recipients of the 4,908 class notices were identified as
 22 unnecessary.

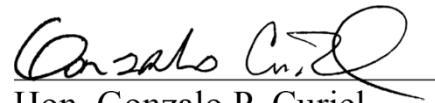
23 **Conclusion**

24 Based on the above, the Court DENIES Plaintiff's motion to associate Kiesel Law
 25 LLC as co-trial counsel, GRANTS Plaintiff's motion to appoint Kiesel Law as co-class
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1 counsel and GRANTS in part Defendant's motion for order requiring corrective class
2 notice. Plaintiff shall issue an amended notice as soon as practicable. The hearing set on
3 April 22, 2022 shall be vacated.

4 IT IS SO ORDERED.

5 Dated: April 14, 2022


6 Hon. Gonzalo P. Curiel
7 United States District Judge

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